In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-116

MARION BUTLER STUART

Petitioner,

v.

RUTH M. BUTLER, PAUL B. BUTLER, JR.,
FIRST NATIONAL BANK OF NEVADA

Petition for a Writ of Certiorari and Motion to Vacate the Judgment Below of the United States Court of Appeals for the Ninth Circuit

STANLEY H. BROWN
BROWN & ALBRIGHT, Chartered
A Professional Corporation
147 East Liberty Street
Reno, Nevada 89501
Attorneys for Petitioner

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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The Petitioner, Marion Butler Stuart, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above entitled case or that said judgment be summarily denied.

I. OPINIONS BELOW

Ninth Circuit. The opinion of the court below in this case is not reported and is set forth in Appendix "A" to this Petition. The Court's Order denying Petitioner's Petition for Re-Hearing is attached as Appendix "B".

District Court. The opinion of the United States District Court for the Northern District of Nevada is not reported and is set forth in Appendix C to this Petition.

II. JURISDICTION

The judgment of the court below (Appendix A, *infra*) was entered on March 29, 1976. A timely petition for rehearing was denied on May 3, 1976 (as set forth in Appendix C to this Petition). The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

III. QUESTIONS PRESENTED

Petitioner alleged in District Court that her father defrauded her in the distribution of assets upon the dissolution of a family partnership. The District Court granted a summary judgment in favor of Respondents holding that Petitioner's claim was barred by the applicable Statute of Limitations and by the equitable doctrine of laches. The factual basis for the District Court's decision was its finding that Petitioner was put on notice of the alleged fraud in 1945 when she signed certain documents at the time the partnership was dissolved. Petitioner disputes that she ever signed the documents and avers that she did not discover the alleged fraud until an audit of her father's papers on his death in 1973. The question presented to this Honorable Court by these facts is:

Whether a District Court may grant a Summary Judgment when there is a genuine controverted issue of material fact to be determined in the action.

IV. CONSTITUTIONAL AND RULES PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States provides in pertinent part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, ...".

Rule 56 (c) of the Federal Rules of Civil Procedure, governing Summary Judgments provides in pertinent part:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law."

V. STATEMENT OF THE CASE

The action arose when Petitioner, some 23 years after the fact, learned that the assets of a family partnership (of which she was a partner) were improperly divided by her decedent father as managing partner. Petitioner filed suit in the District Court seeking to impose a constructive trust on the assets of her father's estate, for an accounting, and for judgment on the accounting. Petitioner's mother and brother, defendants in the District Court and co-respondents herein, together with the Administrator c.t.a. of decedent's will, filed a motion for summary judgment below, invoking the Statute of Limitations of the State of Washington, where the partnership was dissolved, and the equitable doctrine of laches.

The jurisdiction of the Court of first instance is based on diversity of citizenship. The Petitioner is a citizen of the State of Idaho, the Respondent Ruth M. Butler is a citizen of the State of Nevada, the Respondent Paul B. Butler, Jr., is a citizen of the State of California, Respondent First National Bank is a National Banking Association.

The United States District Court for the District of Nevada granted Respondent's Motion, and in its Memorandum Opinion, which is Appendix "C" to this Petition, the Court made the following specific findings:

1. That Petitioner signed both a deed and bill of sale and a voting trust agreement as a partner. (See Appendix "C")

2. That at the time of the dissolution of the partnership, Petitioner knew that she was a partner and knew that the partnership assets were not being distributed proportionately in kind; that she knew that certain stock was a partnership asset and that she was not getting any. These facts, the Court found, were all the facts she needed to know to place her on inquiry. (Page 4, line 31 to page 5, line 14. Appendix "C" attached hereto).

3. That Petitioner must show that by the exercise of reasonable diligence she could not have discovered the fraud. (Page 5, line 12-14, Appendix "C" attached hereto).

4. That the action was also one for a constructive trust and was barred by laches. The Court thereafter ordered Plaintiff's Complaint dismissed.

Petitioner appealed to the United States District Court of Appeals for the Ninth Circuit which Court affirmed the United States District Court of the District of Nevada and found that:

(1) The Statute of Limitations of the State of Washington applies, and that the statute begins to run when the fraud is discovered or when it should have been discovered. (Page 2, Appendix "C" attached hereto).

(2) That Petitioner signed, as partner, a voting trust agreement and a deed and bill of sale.

(3) That the mere fact that Petitioner's signature appeared on the documents was sufficient to justify the finding that Petitioner was put on inquiry that she was a partner.

(4) That any inquiry on Petitioner's part would have disclosed the actual dissolution of the partnership assets.

(5) That the action was barred by the doctrine of laches for the same reasons as apply to the Statute of Limitations.

(6) That there is prejudice to Respondents by the death of the father and the additional fact that the books and records of the business in question have been lost or misplaced.

To date, Petitioner has been denied a jury trial.

VI. REASONS FOR GRANTING THE WRIT

The decisions of the lower courts have so far departed from the accepted and usual course of judicial proceedings concerning summary judgment and trial by jury that this court's supervision is necessary. The law concerning summary judgments is distinctly stated in the cases of *Pollor vs. Columbia Broadcasting System,* 386 U.S. 464; and in *Adickes vs. Kress & Company,* 398 U.S. 144. In the case at bar there exist genuine issues of material fact on each and every issue found by both the court of first instance and the Court of Appeals for the Ninth Circuit. Since these genuine issues of material fact exist, this court ought, in its wisdom, to exercise its supervisory power as prayed for *infra.* The facts which exist to show that there is a genuine issue of material fact will be discussed in the order in which they apply to the issues as they were found in the lower courts and as they are stated in Plaintiff's Statement of the Case, *supra.*

A. Findings of the U.S. District Court for the District of Nevada

Petitioner has compiled Appendix "D" which consists of deposition testimony which shows the existence of disputed issues of fact on each of the following findings which were made by the lower court:

1. *That Petitioner signed a deed and bill of sale and a voting trust agreement as a partner.*

Both Petitioner and her brother, one of the respondents, expressed doubts that the signature purporting to be Petitioner's on the deed and bill of sale and the voting trust was the signature of Petitioner. Both Petitioner and her mother, (also a respondent), testified in deposition that they *never* executed any documents before a Notary Public. The deed and bill of sale in question contains a certification of a notary which certification states that the father, Petitioner, and the mother appeared before her and executed the document. See Appendix "D".

It is highly questionable that the word "partner" was on the voting trust agreement when it was originally signed.

All three partners, the mother, the brother and the Petitioner, state unequivocably, that they did not know they were members of a partnership. However, the lower court, held (and the circuit court affirmed) that Petitioner had sufficient knowledge of her interest in the partnership to put her on duty to inquire. See Appendix "D".

2. *That at the time of the dissolution, Petitioner knew she was a partner and knew that partnership assets were not being distributed proportionately; that she knew that certain stock was a partnership asset, and that she was not getting any, and that these were all the facts she needed to know in order to place her on inquiry.*

This finding was made despite deposition testimony by all three family members, that none of them knew there was a partnership, and especially that none of them knew anything of the transactions that had occurred. Concerning the dissolution of the partnership the Court's finding is made without any supporting testimony in the record, the Petitioner is impressed with knowledge simply by virtue of the fact that the court found that the *doubtful* signature on the documents was her signature. Since the court found it was her signature, the court conclusively

impressed her with knowledge of the partnership and its assets despite her disclaimer and the disclaimers of her mother and brother, that none of them knew anything about a partnership or the transactions involved therein. See Appendix "D".

3. *Petitioner must show that, by exercise of reasonable diligence, she could not have discovered the fraud.*

The situation in the case at bar is one where the Petitioner was the daughter of the managing partner. As daughter of the managing partner she had a close familial relationship with him and had a right to rely upon him. Petitioner was not under a duty to distrust him and investigate his action. See *Townsend vs. Vanderwerkin*, 160 U.S. 171. In addition, the managing partner was her father, and he had a fiduciary duty to her. This is not the same situation as would exist between partners dealing at arm's length. These two facts coupled with the deposition statement that neither she nor her mother or brother knew anything of the existence of a partnership in the first instance creates a question of fact as to the reasonableness of her diligence. See Appendix "D".

4. *That this action is barred by laches.*

Respondents are not prejudiced by this action. Any testimony which the deceased father could give would merely be cumulative either clouding the issue of whether or not he disclosed to the Petitioner what was happening, at the time of dissolution, or supporting the claims of Petitioner. Sufficient evidence is present at this time to merit a trial to the jury and in the event there is not sufficient evidence, Defendants would have appropriate remedies at the close of Petitioner's case. Petitioner has the burden of proving her claim and should not be foreclosed at this point from proceeding to trial. See also *Townsend vs. Vanderwerkin, supra.*

B. Findings of the U.S. Court of Appeals for the Ninth Circuit:

1. Plaintiff does not disagree with the court's application of the Washington State Statute of Limitations.

2. That Plaintiff signed as a partner a voting trust agreement and a deed and bill of sale. See A (1) above.

3. The mere fact of Petitioner's signature on the document put her on the duty to inquire.

This is clearly not the law. One always has an opportunity to explain their failure to read the documents upon which their signature appears. See *Elliott v. Sackett,* 108 U.S. 132; *Union P.R. Co. v. Harris,* 158 U.S. 326; *Ackenlind v. U.S.* 240 U.S. 531.

4. That any inquiry on Petitioner's part would have disclosed the actual distribution of the partnership assets.

If this point is conceded *arguendo,* Petitioner must have known of the existence of the partnership to have knowledge of the distribution be meaningful to her. The uncontroverted testimony is that none of the family members knew of the existence of the partnership at the time of the dissolution. Why should Petitioner be held to a higher degree of knowledge than the other members of the partnership and who now reap the benefits of the unequal distribution.

There is also the question of fact whether or not Paul B. Butler, Sr. would have made any disclosure of the distribution to Petitioner, had she sought that information from him. All family members agree that the father was a dominating man who demanded and did not ask. See Appendix "D".

5. That the action is barred by the doctrine of laches for the same reasons as apply to the Statute of Limitations.

Generally, see discussion above.

6. That there is prejudice to the Appellees by the death of Paul B. Butler, Sr. and the fact that some of the books

and records of Paul B. Butler Packing Company have been misplaced. See A (4) above and *Townsend vs. Vanderwerkin, supra.*

VII. CONCLUSION

For the reasons stated, this Honorable Court should summarily vacate the judgment of the court below. That decision deprives Petitioner of her right to adjudicate her common law dispute with Respondents at a properly convened trial by jury; and, is in contravention of both the spirit and letter of Federal Rule of Civil Procedure 56(a) which should govern the issuance of a Summary Judgment by a District Court.

Summary reversal or vacation of the judgment below is appropriate in this case and is consistent with this court's practice in cases not only where the law is settled by prior decision (e.g. *Alleghany Corporation v. Breswick,* 330 U.S. 812, and five subsequent cases summarily reversed on the authority thereof reported in 330 U.S. 812 and 831 U.S. 791), but also where the action of the lower court was clearly improper (e.g. *Franklin v. Jonco Aircraft Corporation,* 346 U.S. 868; *White v. Howard,* 347 U.S. 910; *Riss & Co. v. United States,* 342 U.S. 937; *Rogers v. Paul,* 382 U.S. 198, *Carter v. West Feliciana Parish School Board,* 396 U.S. 290.

Respectfully submitted this 26th day of July, 1976.

BROWN & ALBRIGHT, Chartered
A Professional Corporation
STANLEY H. BROWN

147 East Liberty Street
Reno, Nevada 89501
Attorneys for Petitioner

Appendix "A"

DO NOT PUBLISH

United States Court of Appeals
for the Ninth Circuit

MARION BUTLER STUART, *Appellant.* vs. RUTH M. BUTLER, PAUL B. BUTLER, JR. FIRST NATIONAL BANK OF NEVADA, *Appellees.*	No. 74-2839

MEMORANDUM

[March 29, 1976]

Appeal from the United States District Court
for the Northern District of Nevada

Before: BROWNING and ELY, Circuit Judges,
and BATTIN,* District Judge.

Stuart appeals from an order granting summary judgment in favor of the appellees. We affirm.

Appellant filed her suit, a diversity action, on April 17, 1973. She alleged that her father had defrauded her in the distribution of the assets of The Butler Packing Company (Butler Packing), a family partnership. The partnership consisted of three partners, Paul B. Butler, the father of appellant and the managing partner, Ruth M. Butler as trustee for appellant's brother, and the appellant. In December, 1945, the Wm. Edris Company (Edris Company) was formed, and the assets of Butler Packing were transferred to the Edris Company over a period of about

*Honorable James F. Battin, United States District Judge, District of Montana, sitting by designation.

one year in exchange for Edris common stock and secured notes. Sometime in 1946, Butler Packing was dissolved. At that time appellant was almost twenty-five years of age. Appellant received a secured note in the amount of $105,000 as her share of the distribution. Appellant contends that this amount was far less than should have been her proportionate share of the distribution.

Paul B. Butler died in 1972, and appellant subsequently instituted this action against his estate and others, claiming that she had knowledge neither of the existence of the partnership nor of its dissolution until the death of her father. The District Court held that Washington law should be applied, and that ruling is not challenged on this appeal. The District Court based its summary judgment upon the grounds that the action was barred by Washington's statute of limitations (RCW § 4.16.080(4) and by the doctrine of laches.

Washington's three-year statute of limitations begins to run in fraud cases either when the fraud was discovered or when it should have been discovered. *Strong v. Clark,* 352 P.2d 183, 184 (Wash. 1960); *Henriod v. Henriod,* 89 P.2d 222, 225 (Wash. 1938).

Because we are reviewing an order granting summary judgment, we look to the undisputed facts to determine whether appellant, at least three years before she filed her suit, was apprised of facts sufficient to place upon her obligation to inquire into the business activities of the partnership and, if so, whether a reasonably diligent inquiry would have disclosed the alleged fraud. *See id.* Appellant signed, as a partner, a voting trust agreement with Mr. and Mrs. Edris of the Edris Company and a Deed and Bill of Sale transferring certain property from Butler Packing to the Edris Company. Both of these documents were dated January 31, 1946. In our view this in itself was enough to justify the determination that the appellant was put on inquiry that she was a partner in Butler Packing and that certain transactions affecting her were taking place. Whether appellant had any actual knowledge of what she was signing is immaterial. Moreover, the record makes it abundantly clear that any reasonable inquiry would have revealed to appellant the actual distribution of partnership assets and that, from this, she could have determined whether she had received her true proportionate share. Thus, the limitations period began to run in 1946, and the District Court did not err when it held that appellant's action was barred by the applicable statute of limitations.

Insofar as appellant seeks equitable relief, we agree with the District Court that appellant's claim is barred by laches for essentially the same reasons that the legal claim is barred by the statute of limitations. Appellant's contention that appellees have not shown that they were prejudiced by the long delay is without merit. The books and records of Butler Packing have been either lost or misplaced, and the managing partner is dead. The prejudice to appellees is obvious.

AFFIRMED.

Appendix "B"

United States Court of Appeals
for the Ninth Circuit

MARION BUTLER STUART, *Appellant.* vs. RUTH M. BUTLER, PAUL B. BUTLER, JR. FIRST NATIONAL BANK OF NEVADA, *Appellees.*	No. 74-2839 ORDER

Before: BROWNING and ELY, Circuit Judges, and BATTIN,* District Judge.

The Petition for Rehearing is denied.

.....
United States Circuit Judges

.....
United States District Judge

*Honorable James F. Battin, United States District Judge, District of Montana, sitting by designation.

Appendix "C"

In the United States District Court
for the District of Nevada

MARION BUTLER STUART, *Plaintiff,* vs. RUTH M. BUTLER; PAUL B. BUTLER, JR., FIRST NATIONAL BANK OF NEVADA, a national banking association, Special Administrator, c.t.a., of the estate of PAUL B. BUTLER, deceased, et al., *Defendants.*	Civil No. R-2856 BRT

MEMORANDUM OPINION

This is an action commenced on April 17, 1973, to impose a constructive trust and for an accounting. It is before the Court on defendants' motion for summary judgment.

The causes of action alleged arise out of transactions occurring between 1943 and 1946 conducted by plaintiff's father, Paul B. Butler, Sr. Mr. Butler died on April 26, 1972.

Plaintiff alleges that she was the owner of an undivided one-fifth interest in a partnership called the Butler Packing Co.; that the partnership was dissolved in December 1946 and that upon distribution of the partnership assets, her father, in substance, defrauded her of her fair share of the partnership assets. The motion for summary judgment is based on the statute of limitations and laches. Plaintiff alleges that she had no knowledge of the facts supporting her claims for relief until the latter part of the year 1972.

Counsel for the parties have diligently pursued discovery and have accumulated, by deposition and exhibits, the reliable information available concerning the 1940 transactions. The Court has read all the depositions and the exhibits. The depositions are primarily remarkable for what they fail to prove.

The Butler Packing Co., a partnership, was formed on October 1, 1943, according to a fictitious name certificate filed with the County Clerk of King County, Washington. The partners were Paul B. Butler, deceased, Marion Elinor Butler, plaintiff and Ruth M. Butler (the widow of Paul B. Butler), as Trustee for Paul B. Butler, Jr. The respective partnership interests were not stated. On September 30, 1943, two corporations owned by the Butler family were liquidated and the assets distributed to the stockholders. These were the John A. McGregor Co., Inc., a Washington corporation owned three-fifths by Paul B. Butler and two-fifths by Ruth M. Butler as Trustee for Paul B. Butler, Jr., and Butler Packing Co., Inc., a Washington corporation, owned three-fifths by Paul B. Butler and one-fifth by Marion Elinor Butler and one-fifth by Ruth M. Butler as Trustee for Paul B. Butler, Jr. Presumably, the assets of these two corporations became the capital of Butler Packing Company, a partnership. One of the prime difficulties faced by the parties is that no books and records of the *partnership* have been found. To the extent that the partnership transactions have been reconstructed, dependency has been had on other records, primarily recorded documents, some fairly unilluminating accounting records of the Paul B. Butler, Jr. trust, and the corporate records of the Wm. Edris Co., a Washington corporation.

The Wm. Edris Co. was organized in 1945. Apparently all the assets of Butler Packing Co., a copartnership, were

transferred to Edris in exchange for nine hundred shares of Edris stock and secured notes aggregating $486,500. According to the minutes of an Edris directors meeting on December 18, 1946, Mr. Paul B. Butler, Sr. announced that the Butler Packing Co., a copartnership, was being dissolved and requested a division of the stock and notes among the partners. At that time, new secured notes were issued as follows:

To Ruth M. Butler, as Trustee for Paul B. Butler, Jr.	$126,500
To Marion Elinor Butler	$105,000
To Paul B. Butler (Sr.)	$255,000

At the same time new stock certificates were issued as follows: Three hundred shares to Ruth M. Butler as Trustee for Paul B. Butler, Jr., and six hundred shares to Paul B. Butler (Sr.). Plaintiff's principal complaint is her failure to receive a pro rata share of the Edris corporate stock. We note, however, that the division of the secured notes does not track the claims of any of the parties. If plaintiff's partnership interest was one-fifth, as she contends, her note should have been for $97,300; if the interest was eleven per cent, as defendants contend, the note should have been for $53,515.

The Butler financial interests were managed exclusively by Paul B. Butler (Sr.). The depositions of plaintiff Marion Butler Stuart, and of defendant Ruth M. Butler and of defendant Paul B. Butler, Jr. all disclose a lack of knowledge and a failure of memory respecting the affairs of Butler Packing Co., a copartnership.

Plaintiff was born December 21, 1921. She became of age in 1942. She was twenty-five years old at the time the Butler partnership was presumably completely dissolved and liquidated. She was well educated but apparently unsophis-

ticated about financial and legal matters and, until her marriage in August 1946, relied upon her father and followed his directions. Her interest in the Butler partnership was not purchased. It was derived from her ownership of one-fifth of the stock of Butler Packing Co., Inc., a corporation, which her father had registered in her name as a gift. She knew she was a partner in the Butler partnership and signed several legal documents as a partner. Plaintiff has testified that before she was married in 1946, Mr. Butler told her that she owned 563 shares of General Tire stock and $105,000 of bonds of the Wm. Edris Company. (The timing seems to be off here inasmuch as the $105,000 Wm. Edris Co. secured note was not in existence until December 1946). Plaintiff has also testified that her father told her many times between 1946 and 1950 that in the distribution of interests in the Wm. Edris Co., she had received bonds and her brother had received stock and that he felt that the bonds were more secure.

Plaintiff, on January 31, 1946, signed a deed as partner from the Butler Packing Co. to the Wm. Edris Co. and signed as a partner a voting trust agreement covering the 3,000 shares of Wm. Edris Co. stock owned by the Butler partnership. By the documentary evidence, she is impressed with knowledge that the Edris Co. investment was partnership property. Her present excuse that she signed what her father told her to sign and did not read the documents cannot be given weight twenty-seven years after the fact.

At the time of the dissolution of the Butler partnership in December 1946, plaintiff knew that she was a partner and that the partnership assets were not being distributed proportionately in kind. She knew that Edris stock was a partnership asset and that she was not getting any. These are all the facts she needed to know to place her on inquiry.

She was *sui juris* and elected to rely on her father's good judgment rather than to investigate and inquire.

This action is barred by the Washington three year statute of limitations. R.C.W. 4.16.080. The cause of action accrued "on discovery by the aggrieved party of facts constituting the fraud." *Strong v. Clark*, 56 Wash. 2d 230, 352 P.2d 183 (1960); *Henriod v. Henriod*, 198 Wash. 519, 89 P.2d 222 (1938). A bland claim of ignorance is not enough. The plaintiff must show that by exercise of reasonable diligence the alleged fraud could not have been discovered.

This action in equity to impose a constructive trust and for a partnership accounting is also barred by laches. The long delay is obvious, as is the prejudice. The only person who could give an intelligible account of the transactions Paul B. Butler, Sr., is dead. The partnership books and records have been lost or misplaced. The living principals, Marion Butler Stuart, Ruth M. Butler and Paul B. Butler, Jr., know and remember nothing of consequence regarding the Butler partnership, its business and its dissolution. There is even a substantial dispute respecting the extent of plaintiff's partnership interest which cannot be reliably resolved on the record which has been presented. Uncertainty of the proofs is one of the primary reasons for rejecting stale claims. Equity cannot approximate a just result when the facts are uncertain and the proofs have been obscured by lapse of time. *Dam v. General Electric Co.*, 265 F.2d 612 (9th Cir. 1958); *Reconstruction Finance Corp. v. Goldberg*, 143 F. 2d 752 (7th Cir. 1944); *Dixon v. A.T.&T. Co.*, 159 F.2d 863 (2nd Cir. 1947). The cases cited show that summary judgment is proper in these circumstances. Accordingly,

It Hereby Is Ordered that summary judgment is granted in favor of defendants and against plaintiff to the effect

that plaintiff shall take nothing by virtue of her Complaint. Counsel for defendants shall submit an appropriate form of judgment.

Dated: July 3, 1974.

.....

United States District Judge

Appendix "D"

Deposition references:

I. Quotations in the Depositions Pertaining to Petitioner's Signature on the Voting Trust Agreement and Deed and Bill of Sale

Deposition of Paul B. Butler

Page 60, line 4 to 13:

"A. Yes, I would say there are—my mother, my father, it looks like the same signature.

Q. Would the same thing be true of your sister's signature, you don't know whether that is her signature or not?

A. No, I'm not positive.

Q. You are not positive?

A. No, I'm not positive of anything. I'm not even positive of my father's signature, but it looks somewhat like her signature."

Deposition of Marion Butler Stuart

Page 50 to 53:

"Q. That is, your father didn't cover up everything on the page and just say, "Sign on this line", did he?

A. No, he just said, "Sign it".

Q. Was it your belief at the time that he asked you to sign those documents that he was trying to keep from disclosing their nature to you?

A. I never questioned him.

Q. When you say you never questioned him, I take it there were no instances that you recall where you said, "Mr. Butler", or "Father", or however you addressed him, "I'd like to see what I am signing"?

A. Never.

Q. And when you say you never questioned him, was it because at that time in your life you had implicit faith in your father?

A. Yes.

Q. Referring again to Exhibit 3, do you recall noticing the typewritten words that appear right above your signature, "Trustee for Paul B. Butler, Jr."?

A. No.

Q. When did you first learn that your mother served as a trustee for your brother?

A. August 30, 1972.

Q. At the present time, as I understand it, you are unable to identify by general description or otherwise any of these documents that we're referring to that your father handed you, say between 1940 and 1946?

A. Correct.

Q. I'll hand you a document that's been marked Exhibit 8 in the deposition of Paul B. Butler, Jr. and ask you to examine the signatures on page four and tell us if your signature appears thereon.

A. It appears to be my signature. I cannot be sure.

Q. You have no recollection of the circumstances under which you may have signed this agreement?

A. No.

Q. Can you tell us—

A. I don't even know what the agreement is.

Q. This is an agreement which I think has been loosely referred to by your counsel as a loan and trust agreement—not by your counsel—somebody.

Do you recall at the time whether you signed this agreement the other signatures or any of them were on the agreement?

A. I don't remember even signing it.

Q. Now, under the signature line bearing the words "Marion E. Butler" appears the typewritten designation "Marion E. Butler, Partner."

Do you have any recollection of seeing that prior to this time?

A. No.

Q. Do you have any recollection of ever asking your father what it was you were a partner in?

A. No.

Q. Is it your testimony that during this period up through 1946 you did not know you were a partner in any kind of enterprise or entity?

A. Correct.

Q. It is correct, as I understand it, with respect to this document, Exhibit 8, however, that you—that appears to be your signature; is that correct?

A. It appears to be.

Q. I hand you what has been Exhibit 10 to the deposition of Paul B. Butler, Jr. and ask you to examine the signature on the first page thereof and tell us whether or not that is your signature.

A. I cannot be positive.

Q. Does it appear to be your signature?

A. I cannot be positive.

Q. Well, without holding you to any standard absolute positive, in your opinion is that your signature?

A. Normally I don't make B's that way.

Q. Anything else about the signature that appears different from your normal handwriting?

A. No.

Q. Now, page two of this document which is entitled "Deed in Bill of Sale" has a certification by a notary public that Paul B. Butler, Ruth B. Butler and Marion E. Butler appeared before a notary public and executed the document on July—excuse me, January 31, 1946.

Calling your attention to that certificate first of all do you know that notary whose name appears thereon, which I frankly—

A. Lottie Terrill? I know of her. I think I met her once in my life.

Q. You believe the person who is shown in here, I guess it's T-e-r-r-i-l-l, is one Lottie Terrill; is that correct?

A. Yes.

Q. Who is Lottie Terrill?

A. I think she was an employee of Mr. Edris'.

Q. As I understand your testimony you have no recollection of having executed this document in her presence as she recites here on July 31, 1946?

A. Definitely not."

Deposition of Ruth M. Butler

Page 7, lines 3-26:

"Q. Can you state what your understanding of that arrangement was?

A. No, I can't, just that I was asked to sign as trustee for Paul B. Butler, Jr., and I did. The document was evidently brought home for me to sign and I signed it.

Q. Did you ever go to the office and sign these documents?

A. No.

Q. Did your husband ever bring a notary public home so that you could sign the documents before a notary public?

A. No.

Q. Any notarized documents, then, you did not sign before a notary public?

A. Not to my knowledge.

Q. The usual thing was that Mr. Butler would bring some papers home, you would sign them and then he would take them back?

A. Yes.

Q. Did you have any occasion to read these documents?

A. No.

Q. You never read them so you really don't know what they contained?

A. That's right."

II. Quotations in the Depositions Pertaining to the Family's Knowledge of the Partnership

Deposition of Maurice W. Kinzel

Page 27, line 5 to 25:

"Q. Do you have any knowledge from your dealings with her, do you have an impression as to when she learned there was a partnership composed of or known as the Butler Packing Co. from your observations and your transactions with her?

A. Well, at the time Mr. Dreisbach and I met with Mrs. Stuart and Mr. Norberg on the 30th day of August at 1300 Washington Building, which, of course, was the first time any of us had met, and as we went into the minute books and — Mr. Dreisbach was there with the ledger and the journal—I had the impression that both Mr. Norberg and Mrs. Stuart were a little amazed at what they were seeing.

Q. Did they give you an impression of having had any knowledge of the existence of a partnership?

A. They certainly didn't say anything about having known about it. I had the impression—that is all you can have in this situation—

Q. Certainly.

A. They were seeing something they hadn't seen before."

Deposition of Paul B. Butler, Jr.

Page 39, line 7 to Page 40, line 25:

"Q. Now, what can you tell me, Mr. Butler, of the formation of an entity called the Butler Packing Company, a co-partnership, to your knowledge?

A. To my knowledge specifically I can't tell you anything. About all I can tell you is what we've researched on it.

Q. All you can tell me is what you dug up by way of documents; is that right?

A. Right, I don't recall anything.

Q. Let's see. I think this partnership was formed in 1943.

A. Yes.

Q. And at that time you were approximately fifteen years of age?

A. Right.

Q. And you have no memory, then, is that what you are telling me?

A. That's right.

Q. Of the formation of this partnership or even that you were a partner in it?

A. That's correct.

Q. Somebody else was maintaining the records?

A. That's correct.

Q. You never made any entries in the records?

A. No, never.

Q. Or indeed ever saw them.

A. No, No, I don't recall ever seeing them.

Q. All right. When is the first time you saw those records?

Q. When I went over to my dad's filing cabinet.

Q. So up till that time you didn't even know there were trust records of a trust which had been maintained for you?

A. I don't recall any. To the best of my recollection I don't recall.

Q. You have no memory, no present memory?

A. No, yes, right.

Q. Now, there came a time when the co-partnership January 31, 1946, exchanged its assets for obligations of the William Edris Company, and when the co-partnership bought some stock in the William Edris Company, to-wit: some nine hundred shares. I assume that other than your researchers into the documents here you have no memory of that as well?

A. No, I don't. That is correct.

Deposition of Ruth M. Butler

Page 28, line 19 to Page 29, line 12:

"Q. Did your husband discuss this partnership with you?

A. With William Edris Company?

Q. No, the Butler Packing Company, a co-partnership.

A. No, he did not. We didn't discuss—

Q. He did not discuss that with you at all?

A. Not that I recall.

Q. So he would not have discussed with you that Marion accepted a note in full satisfaction of her partnership interest in the Butler Packing Company, a co-partnership?

A. I don't believe so.

Q. So you have no knowledge as to whether she did or not; is that correct?

A. I don't—I have no knowledge of it.

Q. And you likewise have no knowledge as to whether she had—she knew what the partnership assets were?

A. I don't think she did. I don't think anyone did. I know I didn't."

III. Quotations in the Depositions Pertaining to Family's Implicit Faith and Confidence in the Father

Deposition of Ruth M. Butler

Page 21, line 4 to 12:

"Q. Now, the management of the business affairs of that trust were handled by Mr. Butler?

A. Definitely.

Q. You had nothing to do with it whatsoever?

A. No.

Q. Any time documents were necessary to be signed he'd bring them home, you'd sign and he'd take them away again?

A. That's about right."

Deposition of Marion Butler Stuart

Page 54, line 20 to Page 55, line 1:

"Q. As of the date of this document, January 31, 1946, did you still have implicit faith and confidence in your father?

A. Certainly.

Q. And it was still your practice as of that date to sign any documents that he put in front of you when requested to do so, is that correct?

A. Yes."

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-116

MARION BUTLER STUART,
Appellant-Petitioner,
v.
RUTH M. BUTLER, et al.,
Appellee-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondents in Opposition

VIRGIL H. WEDGE
WOODBURN, FORMAN, WEDGE, BLAKEY, FOLSOM & HUG
First National Bank Bldg.
1 East First Street
Reno, Nevada 89505
Of Counsel

CHARLES E. HANGER
BROBECK, PHLEGER & HARRISON
111 Sutter Street
San Francisco, CA 94104
Attorney for Respondents

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Brief in Opposition to Petition for Certiorari and "Motion to Vacate Judgment Below"

Preliminary

This case precisely fits the classic mold of cases which should be disposed of on summary judgment because a material allegation of the complaint is demonstrated to be both untrue and unprovable on discovery. In her complaint, plaintiff *alleged* that she had "no knowledge" in 1946 about the common stock which her father and brother acquired when Butler Packing Company, a partnership, was dissolved in 1946 and which she now asks the Court to

redistribute in part to her. In discovery, indeed in deposition testimony given and later corrected by plaintiff herself, she *admitted* not only that she knew of the existence of the stock in 1946 but also that her father repeatedly told her between 1946 and 1950 that her brother had been given stock and she had not. As soon as plaintiff's knowledge was exposed under oath, her only arguable basis for suspending the application of the statute of limitations and the doctrine of laches disappeared. Both the District Court and the Court of Appeals easily perceived as a matter of law that plaintiff waited more than twenty years too long to bring this suit to attempt to work a larger gift from her deceased father.

REASONS FOR DENYING THE WRIT

Statement

This is one of several actions, including two in the state courts of California and Nevada, by which petitioner MARION BUTLER STUART seeks to disturb, obstruct or alter the distribution of her late father's estate to the detriment of her mother, brother, half-brother, and her nieces and nephews. Petitioner, whose husband, Elbridge H. Stuart, is the grandson of the founder of Carnation Company and whose children are amply provided for by Stuart trusts, here demonstrates that she has ample resources to instruct her lawyers to attempt to carry her ill-motivated campaign all the way to this court of last resort.

The record in this case discloses that petitioner was well-treated and well-educated by her father and had a normal familial relationship with him until 1966. Then, at age 45, she became totally estranged from her father and never saw or spoke to him thereafter up to the date of his death, April 26, 1972. Shortly after his death, seemingly to vindicate her treatment of him in his last years, she launched her fusillade of litigation, including this case.

As the opinion of the District Court shows, the parties have diligently pursued discovery in this case and have put before the Court the reliable information available concerning the 1946 dissolution of Butler Packing Company which plaintiff seeks to redo Pet./Cert. App. C., p. 6). Although the Court was unable to precisely determine the respective interests of the partners in Butler Packing Company from the evidence, the Court was able to determine that your petitioner was fully advised about the dissolution of the partnership by her father in 1946 and that she was then fully competent and *sui juris*. So finding, upon your petitioner's own admissions, the Court properly held that this action was filed more than a quarter-century too late.

ARGUMENT

This case has absolutely no redeeming legal value. No important question of Federal law lurks here—in fact, in its legal determinations, the Court found and applied the limitation of actions law of the State of Washington in deciding this diversity case.

There are no special or important reasons for review of this case. There is no conflict in the decision of the Court of Appeals either with a decision of this Court of any lower Federal Court or in the application of the governing law of the State of Washington. Your petitioner does not suggest that any of the foregoing reasons for review applies here and none does.

Petitioner's argument that there has been a departure from the "accepted and usual course of judicial proceedings" in the lower courts is wholly specious. It is a patently desperate attempt to affix a Rule 19 label to a container whose product has no Rule 19 ingredients, and which is, indeed, a hollow vessel.

Her suggestion that the right to jury trial secured by the Seventh Amendment to the Constitution of the United States is somehow involved here underscores her inability to distinguish a genuine issue of material fact from her phantom pleaded issue

of lack of knowledge. And, further, it ignores the salutary admonition of Professor Moore that: "if the only question involved in the litigation is one of law and there is no dispute as to material issues of fact, there is no room for a contention by the losing party that the granting of a motion for summary judgment deprives it of a jury trial." *6 Moore's, Federal Practice*, § 56.06[2], pages 56-90, 56-91.

It is manifest from the petition and its all-consuming concern with "findings" of the courts below that petitioner blithely ignores this Court's long-standing admonition that it "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227. In filing this petition, petitioner places herself squarely within the large majority of misguided certiorari seekers referred to by Chief Justice Taft in *Magnum Co. v. Coty*, 262 U.S. 159, 163:

> "The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Furthermore, on the showing made here, the "Motion to Vacate the Judgment", which is apparently lodged in the "Conclusion" of the petition (Pet., p. 9), is neither timely nor properly coupled with the petition for certiorari. The cited "authority" for *summarily* vacating the judgment is suspect for two manifest reasons:

> (1) The cited case of *Allegheny Corporation v. Breswick*, 330 U.S. 812 is not found at 330 U.S. 812[1] nor are the "five subsequent cases summarily reversed on the authority thereof reported in 330 U.S. 812." None of the *per curiam* decisions or orders reported at 330 U.S. 812 either relates to writs of certiorari or remotely supports the motion to vacate the judgment.
>
> (2) "The five subsequent [Supreme Court] cases summarily reversed on the authority of [*Allegheny*] reported in 831 U.S. 791" (sic) either:
>
> (a) will be decided in about the year 2058 if the present system of numbering the United States Reports is followed, or
>
> (b) will never be decided if the United States Reports adopts a Second Series of Reports.

1. A case of this title is reported ten years later at 355 U.S. 415. It does not deal with summary motions to vacate but relates to vacation of a District Court judgment which ignored the mandate of the Supreme Court in an earlier opinion in the same case reported at 353 U.S. 151.

In either event, these undecided, unnamed cases lend no present comfort to the motion here advanced.

The five *per curiam* cases which follow at page 9 of the petition do not sanctify the motion to vacate the judgment. Three cases (*Franklin, White* and *Riss & Co.*) are simply *per curiam* opinions on *appeal*. The other two cases (*Rogers* and *Carter*) are desegregation cases where this Court granted certiorari to two Courts of Appeals which had clearly misconstrued United States Supreme Court decisions which articulated Federal law relating to school desegregation. They bear no factual resemblance to the situation presented by the moving party here.

Finally, while on occasion this Court has suggested that summary judgment procedures be used sparingly in conspiracy cases such as in complex anti-trust litigation (*Pollor*[2]), or racial discrimination cases (*Adickes*), the cases cited at page 5 of the petition, the rationale of the admonition is altogether inapposite here. The simple question resolved here was that this hoary state claim was not legally fit for adjudicating. As the Ninth Circuit held in a case followed by the District Court here (Pet./Cert. App.C., p. 9): Summary judgment "may be used effec-

2. At page 5 of her petition, petitioner cites *Pollor v. Columbia Broadcasting System*, 386 U.S. 464. We assume the intended reference is to *Poller v. Columbia Broadcasting System*, 368 U.S. 464.

tively . . . when the affirmative defense pleaded is the statute of limitations," *Dam v. General Electric Company*, 265 F.2d 612, 614 (9th Cir. 1958). This conclusion, respondent submits, is unassailable in logic or in law.

CONCLUSION

The petition presents no question worthy of review, no conflict and nothing novel. Respondents submit that it should be denied.

DATED: San Francisco, California, August 19, 1976.

VIRGIL H. WEDGE
Of Counsel

CHARLES E. HANGER
Attorney for Respondents

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-116

MARION BUTLER STUART,
Petitioner,

vs.

RUTH M. BUTLER, PAUL B. BUTLER, JR.,
FIRST NATIONAL BANK OF NEVADA,
Respondents.

Petition for a Writ of Certiorari and Motion to Vacate the Judgment Below of the United States Court of Appeals for the Ninth Circuit

Petitioners' Reply to Respondents' Brief in Opposition

STANLEY H. BROWN
BROWN & ALBRIGHT, Chartered
A Professional Corporation
147 East Liberty Street
Reno, Nevada 89501
Attorneys for Petitioner

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

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Petitioners' Reply to Respondents' Brief in Opposition

I. REPLY TO RESPONDENTS' LEGAL ARGUMENTS.

Respondents made no perceptible legal argument in opposition to Petitioner's Petition for Certiorari and Motion to Vacate Judgment Below. They gleefully pounce upon the printing errors contained in several of Petitioner's cita-

tions, but have apparently had no difficulty finding the named cases, and don't claim to be prejudiced by the missed citations. Furthermore, besides attempting to distinguish Petitioner's case authority on the facts, Respondents do not at any point attack the main legal arguments raised in the Petition for Certiorari, to-wit: (1) That summary judgment is improper if there are material disputed issues of fact; and (2) That reversal or vacation of the judgment below is appropriate in this Court where the action of the lower courts were *clearly* improper.

II. REPLY TO RESPONDENTS' FACTUAL ARGUMENTS.

Respondents devote a large portion of their Brief in Opposition to a sarcastic personal attack on the Petitioner. It is unfortunate that they have so little respect for this privileged forum that they seek at this point to inject numerous facts into the record which have never been introduced in evidence—most of which they well know to be patently untrue.

The one concrete factual allegation which the Respondents make is that Petitioner was placed on notice of the existence of the family partnership here at issue in 1946 because her brother "had been given stock but she had not."[1] Apparently, Respondents reason that because Petitioner was not given stock by her father she was put under some duty to investigate the source of her brother's gift, which would then have led to her discovery of the existence of the family partnership. This argument is legal nonsense, for no rule of law exists forcing children to investigate the source of gifts from their parents to them or their siblings. This reasoning is even sillier when ap-

1. Brief in Opposition, page 2.

plied, as here, by the Respondents, because they propose a rule of law whereunder a child is put under a duty to investigate the source of gifts which she *doesn't* receive from her parent. The attempt to bootstrap the aforestated specious legal reasoning into the factual conclusions that Petitioner had notice that she had been defrauded by her father in 1946 can best be described by the phrase *non sequitur*.

In fact, the only evidence of any kind that Petitioner knew about the family partnership at issue here—and the evidence upon which the District Court relied in granting summary judgment in this case—was her alleged signature on various partnership documents.[2] The critical questions in this case have always been: (1) Whether the signature on the documents relied upon by the District Court is, in fact, the signature of the Petitioner (Respondents say it is; Petitioner both alleges and has proof that it is not.). (2) And, assuming *arguendo*, that the signature on the trust documents is that of the Petitioner, whether she can be conclusively presumed to know the contents of a document upon which her signature appears. (No such rule of law exists.)

III. CONCLUSION.

The crucial issue in this case has become *when* the Petitioner had knowledge of a family partnership sufficient to put her on notice that she had been defrauded by her father on the dissolution of that partnership. The District Court decided that the Petitioner had such knowledge twenty years ago, relying on the fact that her apparent signature appeared on certain partnership documents dated in 1946. However, there is substantial evidence that neither

2. Appendix to Petition for Certiorari, page 8.

the Petitioner nor any of the other surviving members of her family ever knew about the family partnership at issue here. By deciding that Petitioner had knowledge of the family partnership in 1946, the District Court decided a crucial and disputed issue of material fact. Such a holding abuses the power of summary judgment, and Petitioner thereby prays that the instant Petition for Certiorari or to Vacate The Judgment Below be granted.

Respectfully submitted this 15th day of September, 1976.

STANLEY H. BROWN
BROWN & ALBRIGHT, Chartered
A Professional Corporation
147 East Liberty Street
Reno, Nevada 89501
Attorneys for Petitioner